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In p^m Chas Warner Dunbar

[Lord GARDENSTON Reporter.]

January 16. 1771.

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INFORMATION

FOR

CHARLES WARNER-DUNBAR of:
Machermore, Pursuer,

AGAINST

Alexander Kewan, Defender.

IN 1749, the deceased Patrick Dunbar of Machermore executed an entail of that estate in favour of himself, and the heirs of his body; whom failing, to William Dunbar merchant in Antigua, father to the pursuer, and the heirs-male of his body; whom failing, to a series of other substitutes; and as he does not seem to have intended that the same should be registered in his own lifetime, and being justly apprehensive that the registration thereof, after his death, might be disappointed, and that by the absence or minority of the heir next in succession, the estate might be left without any person to take the management of it, both these events were provided for by the following clause. "I hereby recommend to, and fully authorise, John Vans of Barndarroch, David Maxwell of Bardrochwood, and Leonard Urquhart writer to the signet, or any of them who shall be

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" on

21st Febry 1771.

*Further defence
and advise
send expenses
due.*

*By the case,
That a young gentle
man gets a factory
from his father with
a power of raising
money for his children.
he grants a lease
of 100 years of
ground, he then
sets aside his father's
right to the estate &
sells it to reduce
his debts. he has sold
ground and nothing
which he has sold
occurred. He is
bound to make execution*

“ on life after my decease, to cause registrate these presents
 “ in the register of tailzies, conform to the 22d act of the
 “ 1st session of parliament of James VII. ; and with power
 “ also to them, or any of them, as said is, as trustees for me
 “ and my said heirs of entail, to do all and every other thing
 “ that may be necessary to complete and execute this settle-
 “ ment or deed of entail ; or in the absence or minority of
 “ the heirs, to appoint factors for the preservation of the e-
 “ state, and uplifting the rents thereof, for the use and be-
 “ hoof of all parties having interest ;” and as it contained
 the usual prohibitive, irritant, and resolute clauses, *de non*
alienando et contrahendo, it was recorded in the register of tail-
 zies in July 1762.

Upon the death of Patrick Dunbar without issue, William Dunbar was served heir of tailzie under the aforesaid deed of settlement ; but as he seems then to have entertained no thoughts of returning to this country, but continued to reside in Antigua, which therefore required, that the management of his estate in this country should be intrusted to some person in whom he could confide, with more ample powers than those conferred by the tailzie itself, as being only meant for a temporary expedient, he, of this date, 3d June 1761, executed a letter of attorney in favour of John Agnew of Sheuchan, empowering the said John Agnew, in his name, place, and stead, and to his use, from time to time, at his discretion, to let, and set in tack and assedation, all or any of the lands of Machermore, then belonging, or which shall thereafter belong to him. And the same letter of attorney contained powers for borrowing money, by wadset or mortgage, and to uplift and receive not only the rents of the estate, but all debts and sums of money then due, or which might thereafter become due to him, and to sue and defend in all actions, &c.

It would appear that Sheuchan did not chuse singly to undertake the management of this estate, and of William Dunbar's

bar's other affairs in this country ; and therefore it was that, of this date, he executed another power of attorney, in the same terms with the former, with this only difference, that David Maxwell of Bardrochwood was joined to Sheuchan. June 3 1762.

But as the last-mentioned power of attorney seemed liable to an objection, as not being properly tested according to the forms prescribed by the law of Scotland, these gentlemen transmitted to William Dunbar a proper factory, extended in the Scots form, in order to be signed by him.

This factory and commission was, of this date, duly executed, and forthwith transmitted to Scotland ; whereby he nominated and "appointed the aforesaid John Agnew of Sheuchan, and David Maxwell, and with them William Maxwell, the son of David, to be his factors and commissioners, to the effect under written ; giving and granting to them, or any two of them, (whom he appoints to be a quorum), or to the survivor if but one, full power, mandate, and commission, for him, and in his name and behoof, to manage and direct all and sundry affairs, in which he is or shall hereafter be concerned in Scotland, during the continuance of this factory." And it contains the following clause, which will be particularly attended to ; "and in case my said commissioners shall think it to be for my interest to cut and dispose of any woods growing on my said lands and estate, particularly in the lands of Blackraig, or to let out any part of my lands and estate where there may be a prospect of lead or other mines and minerals, to persons willing to work the same, they are hereby fully impowered to do so in the manner, and upon the terms, which they shall judge to be most advantageous for them." And it is thereby declared, that the same shall subsist, until revoked by a writing under his the said William Dunbar's hand. May 30 1764.

This factory arrived in Scotland in the month of August 1764, and was recorded in the commissary-court books of Wigton,

Wigton, within which jurisdiction the estate of Machermore lies, upon the 23d October thereafter.

And as this letter of attorney did vest these gentlemen with the most ample powers for the total management of William Dunbar's estate and effects in this country, and, more particularly, with a power of granting leases, and which was to continue in force until recalled by a writing under William Dunbar's hand, the pursuer is, in the sequel, humbly to maintain, that these powers were never recalled, either expressly, or by implication.

It would appear, that at this very period William Dunbar was so overwhelmed with debts, and which has since ended in a total bankruptcy, that it became necessary to raise, with all possible expedition, as large a sum as possible to extricate him from the difficulties with which he was then pressed; and it readily occurred, that as the state of his affairs would not be known in Scotland, ways and means might be fallen upon, by mortgages and otherwise, to raise a sum of money upon the Scotch estate.

In this view, and for this only purpose, he resolved to send over to this country his son Charles Dunbar, the now pursuer, then a very young man, totally unacquainted with matters of that kind, and equally ignorant of the import and style of writings, and granted him a power of attorney, of this date, and of the following tenor. " Know ye, that I the said William

Sept. 1: 1764.

" Dunbar, for divers good causes and considerations me there-
 " to moving, have deputed, authorised, constituted, and ap-
 " pointed, and by these presents do depute, authorise, con-
 " stitute, and appoint, my said son Charles Warner-Dunbar
 " to be my true and lawful attorney irrevocable; and I do
 " hereby authorise and empower my said son, to raise any
 " sum or sums of money that he shall think proper, by lease,
 " mortgage, assignment, sale, or other disposition, of all or any
 " part of the said estate called Machermore, or of the lead-
 " mines therein, or woods growing thereon; and after any trea-
 " ty

" ty and agreement made and concluded with any person or
 " persons for that purpose, then I do authorise and empower
 " the said Charles Warner-Dunbar, for me, and in my name,
 " to sign, seal, and deliver, any mortgage, lease, assignment,
 " conveyance, or assurance, to any person or persons that shall
 " agree to lease, or purchase, or to take a mortgage, or any o-
 " ther conveyance of the same premises, or any part of them,
 " as my said son Charles Warner-Dunbar, in his discretion,
 " shall think fit, for the sufficient leasing, mortgaging, af-
 " signing, conveying, and assuring of the said estate, call-
 " ed the estate of Machermore, or any part thereof, or of the
 " lead-mines therein, or wood growing thereupon, to the
 " person or persons who shall contract for a lease, mortgage,
 " or other conveyance of the premises, or any part thereof,
 " for the execution of every such treaty and agreement as a-
 " foresaid; and to do all other lawful acts and things what-
 " soever concerning the premises, as fully in every respect
 " as I myself might, or could do, if I were personally pre-
 " sent."

From comparing these two powers of attorney last above
 mentioned, so recently after one another, it will be obvious
 to your Lordships, that they are no wise inconsistent or con-
 tradictory to one another, but that both might subsist, *simul*
et semel, as granted for very different ends and purposes; the
 first of these to three gentlemen residing in Scotland, for the
 general management of the estate of Machermore, and of his
 whole other affairs in this country, and therefore declaring
 the same to continue in force, until revoked by a writing un-
 der his hand; the other to his son the pursuer, sent home to
 this country for a special purpose, viz. to raise a sum of mo-
 ney, by selling, mortgaging, &c. the estate, in whole, or in
 part, and containing no revocation of the former general
 faculty, granted but three months before.

And as this last-mentioned faculty was made out at An-
 tigua, your Lordships will observe, that the expressions and

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technical

technical terms therein made use of are, in the style and language of the law of England, of very different meanings from the corresponding expressions in the law of Scotland, particularly where mention is made of mortgaging and assuring said estate, and the sealing any conveyances, or other deeds, to be granted of or concerning the same.

Sept. 21. 1764 It seems to have occurred to William Dunbar, that, during the time of the son's residence in Scotland, it would be proper to conjoin him with the factors formerly appointed; and therefore, by deed of this date, he granted another factory, or power of attorney, whereby, after narrating the deed of entail, and the powers conferred upon the trustees therein named, and judging it proper to enlarge the powers of said trustees, and having full trust and confidence in the three persons above named, viz. Mess. Maxwell, Agnew, and Urquhart, and in his son Charles Warner-Dunbar, *if he shall happen to be in Scotland*, and William Maxwell, eldest son of the said David Maxwell, as being properly qualified for the management, in his absence, of the said estate devolved to him in virtue of the said deed of entail, and of his other affairs in Scotland, therefore, " to have nominated and appointed the said John Agnew, David and William Maxwells, and Leonard Urquhart, to be my factors and commissioners for the purposes under written; hereby giving and granting to them, or any two of them, whom I appoint to be a quorum, or to the survivor, if but one, my full power, mandate, and commission, for me, and in my name, and for my behoof, to manage and oversee all and sundry affairs in which I am, or shall hereafter, during the currency of this factory, be concerned in Scotland, and with power to my said factors and commissioners to remove tenants, raise and prosecute warnings and removings, receive vassals, and enter into, and grant tacks on, such conditions, for such rents and terms as they shall think expedient; such tacks not exceeding nineteen years in
" their

"their endorance, and not being granted under the present
"rent."

It also contains a power to uplift any other sums due to him in Scotland, and to appoint factors under them; and to transact and submit all differences and disputes they may be engaged in.

And it contains this other clause, "and my said commissioners are impowered to apply the produce of my said estate, or any other sums they may receive on my account, in the first place, towards payment of the debts affecting the estate; and to take assignations thereto in their names, for my behoof: and in case it shall be found necessary to borrow any sums of money for clearing off the said debts, for the improvement of my estate, I hereby give my said commissioners full power to borrow such sums, and to give such securities therefor, as by the said entail I am allowed to do."

The pursuer arrived in Scotland in November 1764, invested with the powers granted to him by the power of attorney 1st September that year, and the last mentioned power of attorney, dated 21st September, reached Scotland in the December following.

The pursuer was then but a very young man, having just attained the years of majority, without either knowledge or experience that could qualify him to execute the unlimited powers with which he was vested by the deed 1st September, for raising a sum of money, by sales, or mortgages, &c. of all, or part of, the estate of Machermore, however qualified he might be to co-operate with the other gentlemen nominated and appointed, both by the prior and posterior letter of attorney, in the ordinary administration, during his temporary residence here.

These other trustees had met with such difficulties and harassment in executing the trust which had been committed to them, that they readily embraced any pretence to deliver themselves

themselves therefrom; and therefore, though the power of attorney 1st September 1764, granted to the pursuer, did neither expressly nor virtually recall the prior factory granted to them, nor was any wise inconsistent therewith, as being granted for very different purposes, they were pleased to consider it as implying a revocation of the former commission to them, and, in respect of certain alledged informalities in the after commission 21st September, declined to act under the same; the plain intendment of which was, to shake themselves free of this troublesome affair, and to throw the whole management upon the pursuer, however unqualified for it.

This was joyful tidings to the tenants upon the estate; as it was easy to foresee, that so unexperienced a youth might more easily be deceived and imposed upon than was formerly the case when the estate was under the management of the trustees. They spoke him extremely fair, professed great affection to him as their young master, would do any thing in their power to serve him; and by thus cajoling him, drew him on by degrees to grant the new leases, upon terms highly unequal, and not for one half of the rent which these lands were capable to yield, and would have yielded, upon the leases being renewed. The imposition was notorious, and joined to the other exceptions which lay against these tacks, if brought under challenge, all the other tenants who had obtained the like leases, this defender only excepted, have surrendered the same, and accepted of new leases from the pursuer, since he came into possession of the estate, upon more equal terms.

Feb. 21 1765. Of this date, a contract was entered into between the now pursuer, *Charles Warner-Dunbar*, and the defender *Alexander Kewan*, tenant in *Meikle Carse*, on the one and other parts; whereby the pursuer, as factor appointed by his father, *by virtue of a power of attorney and factory*, heritable proprietor of the lands and others underwritten, "by virtue of the said power of attorney and factory from his said father, dated, " signed,

" signed, and delivered to him, at Antigua the 1st day of September last, and registered in the register of probative writs at Kirkcudbright, the 14th of February instant, set, and in tack and assedation let, to the said Alexander Kewan, the lands of Meikle Carse, and Fishing-stand, for the space of twenty-one years, from the term of Whitsunday 1769, (when his former lease of these lands was to expire):" For the which causes, and on the other part, Kewan became bound to pay a tack-duty to the said William Dunbar, his heirs, &c. or to his factors, the sum of L. 60 Sterling, with some trifling casualties.

This tack bears to be written by the pursuer himself, and to be subscribed by both parties, before these witnesses, *Alexander Mackeatchy at Machermore*, and *John Adair my servant*; but the subscribing witnesses are, *Alexander Mackeatchy*, and *Alexander Adair*.

From this tack, of the tenor above recited, your Lordships will observe, that being granted *factorio nomine*, under the power of attorney, as therein very particularly described and referred to, the defender was at least equally capable as the pursuer to judge of the import of said power of attorney, and whether it did truly authorise the pursuer to grant such lease.

Another contract was, of this date, entered into between Feb. 26 1765. the pursuer and defender, whereby the pursuer, by virtue of the aforesaid power of attorney therein recited, and specially referred to, let to the defender the lands of Park, Maclurg, and others, as therein described, for the space of twenty-five years, from and after the ensuing term of Whitsunday, for a rent or tack-duty of L. 45 Sterling, payable to William Dunbar, or his attorney, with certain casualties therein mentioned; and as this tack bears to be wrote by the pursuer himself, the instrumentary witnesses are described to be *Alexander Mackeatchy at Machermore*, and *Alexander Adair my servant*.

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And

And the pursuer does aver, That the rent, or tack-duty, specified in the last-mentioned tack, is not equal to one half of the true value of these lands as they stood at the time.

William Dunbar having contracted debts to a very great extent, and several adjudications having been obtained by his creditors, it became necessary for the pursuer, as next heir of tailzie, to advert to the preservation of the estate, which, by means of these diligences, was in danger of a total eviction; and as this could not be effectuated otherwise than by a declarator of irritancy against William Dunbar, a process to the above purpose was brought into this court, concluding to have it found and declared, That, by contracting debts, he had contravened the conditions and provisions of the entail, and had thereby irritate his right; and as various disputes did thereupon arise, the now pursuer ultimately prevailed in declaring the irritancy, and thereafter obtained decret of adjudication, upon which charter and infeftment was expedite, whereby William Dunbar was totally denuded of the estate, and the same disincumbered of any debts or deeds contracted or granted by him, contrary to the prohibition of the tailzie.

The pursuer was willing to have settled matters with this defender upon the same terms that he had settled with others of the tenants who had obtained the like leases; but the defender being too high-minded, or too purse-proud, to come into any measures, the pursuer was obliged to bring the present process of reduction; which being debated before the Lord Gardenston Ordinary, his Lordship took the same to report, upon informations.

The reasons of reduction, which arise from the above state of facts, are, *first*; That they are null and void, as flowing *a non habente*. They bear to be granted by the pursuer *factorio nomine*: the only powers he had from his father, were those conferred by the above-recited letter of attorney, 1st September; and from the tenor thereof, as above recited, it is plain, as any thing can be, that it confers no general power of administration,

ministration, or any revocation of that general right of administration which he had already intrusted to others. The single purpose for which it was granted, was for raising a sum of money, either by sales, or other real securities upon the estate itself.

This will be obvious from comparing this with other factories which he had granted. By these other factories, he committed the general administration of his estate in this country, levying the rents, in-putting and out-putting of tenants, collecting and receiving any debts that should be owing to him, transacting and compounding the same, suing and defending in all actions; and, to say all in one word, to do all and every thing that he himself could have done in the premises; and the same to endure, until recalled by a writing under his hand.

He never recalled the same; so far to the contrary, that the after-commission, 21st September 1764, was a confirmation thereof, by the addition thereby made to the former trustees, with the same general power of administration.

And it has been already observed, that the letter of attorney, dated 1st September, granted to the pursuer alone, was nowise contradictory to, or inconsistent with, the other factories; the same being granted for one special purpose and effect, viz. the raising a sum of money by sales or real securities upon the estate.

It was abundantly imprudent to have intrusted so very young and unexperienced a man with so great a power in that single article; but it is impossible to believe, that he could mean to supersede the former managers, in whom he had the highest trust and confidence, who were so well acquainted with the state of his affairs, and had managed the estate for so many years; and by discarding them all at once, without the least cause of offence, to devolve the whole management upon the pursuer, who had so little knowledge in these matters, and whose residence in this country was not intended to be

be of any longer endurance, than to execute the special commission intrusted to him.

The defender was indeed pleased to aver, That, among other powers conferred upon him by the above-recited factory, 1st September, that of granting leases, is specially made mention of. But as *tota lege perspecta*, the whole powers with which the pursuer was thereby vested, was for the single purpose of raising a sum of money, it is impossible, by any fair construction, that by the word *leases* could be intended the granting of tacks in the common course of administration of that estate; when, by the other factories unrecalled, he has so specially committed that power to the former managers. And it has been already observed, that as William Dunbar had long resided in foreign parts, where the aforesaid factory was formed by persons conversant in the laws of England, it was upon the ideas of that law, by which lease and release is a method of conveying property, unknown in the language of the law of Scotland, that the aforesaid factory was conceived in the above terms; and taking the matter in this view, it is impossible, by any fair construction, that, by this single technical word, William Dunbar can be understood to have intended to have recalled the former factory, granted to the former managers, and to have vested the pursuer with the sole power of granting tacks of the estate.

It is equally plain, that the pursuer did not thereby mean to bind himself personally: The defender saw the powers under which he contracted; they were granted *factorio nomine*, and the rent or tack-duty was taken payable to William Dunbar himself, the proprietor of the estate; so that, if the factory was not sufficient to bind William Dunbar, it was the defenders own fault in contracting with the pursuer *factorio nomine*, when, from the factory itself, they must have seen, that the pursuer was vested with no such powers as intitled him to grant such tacks.

Nor will it vary the case, that the pursuer is now come in-

to possession of the estate, by means of the declarator of irritancy which he obtained. If the character under which he granted these leases did not bind him personally in warrandice of the same, and if his father was not bound thereby, it is, with submission, impossible, that any supervening change of circumstances can subject him to a warrandice, to which neither he nor his father were antecedently liable.

The *second* ground of challenge of these tacks is, their being null and void, as not properly authenticated in terms of the statute 1681. That statute requires, not only the subscription of the instrumentary witnesses, but that they should be specially named and designed in the body of the deed itself; which is plainly not the case with either of the two tacks now under challenge.

For, with respect to the first-mentioned tack, dated 21st February 1765, it has been already observed, that the instrumentary witnesses therein inserted are thus designed, "Alexander Mackeachy at Machermore, and John Adair, my servant;" which last is plainly no designation at all, as it does not specify whether he was the servant of the one party, or the other. All that can from thence be inferred is, that he was servant to one or other of the parties; leaving it quite a moot point whose servant he was; which can never answer the intendment of the statute requiring a special designation.

But neither is this all; as the instrumentary witnesses who sign that tack are Alexander Mackeachy and Alexander Adair; whereas the witness insert in the deed itself is John Adair. So that this tack labours under a double nullity: 1st, That one of the instrumentary witnesses has no proper designation in the tack itself; 2^{dly}, That the witness so improperly designed is not a subscribing witness, but one of a different name.

The first of these objections strikes equally against the other tack; the instrumentary witnesses therein inserted being

ing thus designed, "Alexander Mackeachy at Machermore, and Alexander Adair, *my* servant;" whereby the last of these has no proper designation, the word *my* being equally applicable to the one party as to the other, and therefore no designation at all.

A separate objection lies to the first-mentioned tack, viz. its being *collatum in tempus indebitum*. It is dated the 21st February 1765, and is granted for a term of twenty one years, to take place from and after the term of Whitsunday 1769; that is, at the distance of more than four years after its date. William Dunbar held that estate under a strict entail; and as it is thought to be a clear case, that an heir of entail has no powers over the estate after his own right thereto is determined, he cannot grant a lease to commence after his own right ceases. Was this to be allowed, heirs of entail might grant leases to take effect at any distant period of time, where a lease is clothed with possession during the granter's incumbency. It is properly considered as an act of ordinary administration, and as such will be obligatory upon the after heirs of entail; but where it is made to take place at a distant period, and consequently cannot be clothed with possession during the granter's incumbency, it can have no effect against the after heirs of tailzie succeeding to the estate: And therefore, as this tack was only to take effect from the term of Whitsunday 1769, before which period William Dunbar's right to this estate ceased and determined, by the declarator of irritancy obtained against him, allowing, for argument's sake, that it would have been obligatory upon him, which, for the reasons above mentioned, it is humbly thought it could not be, as he had granted no such power to the pursuer, it cannot be obligatory upon the pursuer, when he came into possession of the estate by the aforesaid declarator of irritancy.

The defender was indeed pleased to contend, That as both tacks were holograph of the pursuer, instrumentary witnesses were not requisite; and therefore that no regard ought to be had

had to any of the objections first above mentioned, respecting the designation of the witnesses.

But this is manifestly insufficient. For however monolateral holograph writings may be probative and obligatory, without witnesses either inserted in the deed itself, or subscribing thereto, that will never apply to deeds of this nature. Contracts between different parties, cannot be binding upon the one party, if they are not equally binding upon the other. There is no supporting such deeds by halves; they cannot be probative or obligatory against the pursuer, if they were not equally probative and obligatory upon the defender: and as it is plain, that they could not be binding upon him, by reason of their being holograph of the pursuer, they are void and null *in totum*, for want of the legal statutory solemnities.

The defender was also pleased to deny, that they were granted for a rent or tack-duty below their real value; though, upon supposition that such truly had been the case, he insisted, that this was no relevant ground of challenge. Nor does the pursuer mean to say that it is, supposing the tacks to be in other respects unexceptionable; and he makes no difficulty to acknowledge, that if the tack-duties had been in any degree adequate to the real worth and value of the lands, he would never have thought of challenging the same upon the other grounds above mentioned. But as he knows for certain, that the tack-duties are not equal to one-half of the real worth and value of these lands at the time; and consequently that a most undue advantage was taken of his ignorance and youth, he cannot justly be blamed for availing himself thereof. And to satisfy your Lordships that this is truly the case, if the defender will join issue upon that fact, he is instantly willing to give up, and abandon all the other grounds of challenge.

The undue advantage taken of the pursuer by this defend-
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er will appear, when it is considered, that the lands were leased by him at the rent they had paid for many years past, while all the lands in the country had risen much in their value: and the grassum paid to the pursuer for both leases, was either L. 100, or 100 guineas; but which of these sums, the pursuer cannot positively say. The farm of Meikle Carse extends to 214 Scots acres, of very fine, rich, strong soil, close to a large navigable river, and all arable; and for this no more than L. 60 is paid. Park-maclurg, and the other grounds falling under the other lease, amounts to 158 Scots acres; the whole being of the above quality, and contiguous to the said river; and for this no more than L. 45 Sterling is paid. And the pursuer can, with great confidence, aver, that it will come out upon proof, by gentlemen of undoubted character and knowledge, that at the time these farms were let, the first was a pennyworth at L. 140 Sterling, and the other at L. 100 Sterling. So that, upon both these farms, the defender has reaped an undue advantage of more than L. 135 Sterling yearly.

The pursuer will beg leave to add, that he did all in his power to prevent the present action. He offered to the defender to renew his lease, at a rent greatly beneath that at which they were rated by the gentlemen who had inspected them; and the tenant having complained that it was too much, the pursuer offered him L. 300 Sterling for a voluntary surrender of his leases; which he thought fit to refuse.

In respect whereof, &c.

ALEX. LOCKHART.